Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

August 2004

Statute cannot limit court's power to hear a renewed motion. In *Le Francois v. Goel* (Cal.App. Sixth Dist., May 20, 2004) (ordered published June 14, 2004) 119 Cal.App.4th 425, [14 Cal.Rptr.3d 321, 2004 DJDAR 7045], the first judge had denied summary judgment. After the case was transferred to another judge, defendant filed essentially the same motion and the second judge granted it.

Renewal motions must be heard by the same judge unless that judge is unavailable. But plaintiff waived this objection by failing to object to a different judge hearing the renewed motion. *California Code of Civil Procedure* § 1008(a) prohibits a second motion unless it is based on new facts or new law. *Civ. Proc.* § 437c(f)(2) prohibits a renewed motion for summary judgment unless the moving party "establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." Nevertheless *Le Francois* held, following *Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 205, [132 Cal.Rptr.2d 89, 94, 2003 DJDAR 3245], that the courts retain the inherent power to rule on motions. A statute limiting the court's power to correct its mistakes, violates the doctrine of separation of powers. (*Cal. Const.*, Art. VI, § 1.) The legislature cannot limit the court's power to correct an error of law on a dispositive issue.

Note: When renewing a motion, be sure to include a declaration stating that the motion was previously made and the reasons for renewing it. Failure to do so may result in your being found in contempt of court. *Civ. Proc.* § 1008(b) and (d).

Caveat: Do not renew a motion routinely. Except in unusual circumstances, the court is unlikely to appreciate your efforts. When confronted with a renewal of a previously denied motion by your opponent, consider a motion for sanctions under *Civ. Proc.* § 128.7. Be sure to check the time lines contained in that statute because you may have to act fast.

Collateral source rule does not apply to damages for breach of contract. Developer cross-complained against subcontractors in an action for construction defects and sought to recover attorney fees paid by its insurer after settling the main case. In *Bramalea California, Inc. v. Reliable Interiors, Inc.* (Cal. App. Fourth Dist., Div. Three, May 13, 2004) (ordered published June 15, 2004) 119 Cal.App.4th 468, [14 Cal.Rptr.3d 302, 2004 DJDAR 7137] the appellate court affirmed the trial court's dismissal of the cross-complaint. As a general rule a party may not recover damages for which it has been compensated by an independent third party. The collateral source rule is an exception to the general rule but it only applies in tort actions.

No equitable indemnity, absent a "predicate tort." An architect sued by the owner for excessive costs incurred in the project because of the architect's alleged negligence, cross-complained against the general contractor for equitable indemnity. The Fourth District Court of Appeal, Division Three, affirmed the trial court's sustaining of the general contractor's demurrer to the cross-complaint, holding that the doctrine of equitable indemnity only applies to joint tortfeasors. Although the contractor and the architect could each be liable for their own torts, there was no common "predicate tort." Hence the doctrine did not apply. *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (Cal. App. Fourth Dist., Div. Three, June 22, 2004) 119 Cal.App.4th 848, [14 Cal.Rptr.3d 721, 2004 DJDAR 7480].

The prohibition on default judgments in quiet title actions merely means an evidentiary hearing is required. *California Code of Civil Procedure* § 764.010 provides, with respect to actions to quiet title that "the court shall not enter judgment by default." This does not mean what it says. It merely means that an evidentiary prove-up hearing is required in these cases. *Yeung v. Soos* (Cal. App. Second Dist., Div Five, June

Create Your Member Profile On-line

Watch for your access code in your mail, or obtain it from your State Bar dues statement. Then go on-line to create your profile and customize your interests. www.calbar.org

Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com

Litigation Section Events

2004 State Bar of California Annual Meeting

October 7–10, 2004
Monterey, CA

For registration and information visit www.calbar.org/litigation

16, 2004) 119 Cal.App.4th 576, [14 Cal.Rptr.3d 502, 2004 DJDAR 7265]; *see also,* Weil & Brown, *Civil Procedure Before Trial*, (TRG 2003) ¶ 5:271.

Noto Bene: A judgment entered in violation of this requirement is not void and a timely motion for relief from default is required.

Absent concealment, prior owner of property is not liable for defective condition. In *Lewis v. Chevron USA, Inc.* (Cal. App. First Dist., Div. One, June 18, 2004) 119 Cal.App.4th 690, [14 Cal.Rptr.3d 636, 2004 DJDAR 7328] a plaintiff was injured when a water pipe burst on property previously owned by Chevron. The trial court entered summary judgment for that defendant. The First District Court of Appeal affirmed, holding that, absent concealment of a known dangerous condition, a prior owner of property is not liable for injuries caused by a defective condition after it relinquished ownership and control of the property. *Also see*, to the same effect, *Preston v. Goldman* (1986) 42 Cal.3d 108; [720 P.2d 476, 227 Cal.Rptr. 817]; *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, [30 Cal.Rptr.2d 210, 94 DJDAR 6668].

Court lacks jurisdiction to hear dispute between city and telephone company. City sued Pacific Bell to recover expenses incurred after it had moved telephone equipment and cable underground. The Fourth District Court of Appeal affirmed the trial court's sustaining of the telephone company's demurrer. The *California Constitution* confers exclusive jurisdiction in cases where the legislature has granted regulatory power to the PUC. (*Cal. Const.*, Art. XII, § 8.) A PUC rule governed the conversion of overhead facilities. And it was up to the PUC to determine where such conversion should take place. *City of Anaheim v. Pacific Bell Telephone Company* (Cal. App. Fourth Dist., Div. Three, June 21, 2004) 119 Cal.App.4th 838 [14 Cal.Rptr.3d 725, 2004 DJDAR 7477]; *see also, People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, [80 P.3d 201, 7 Cal.Rptr.3d 315].

Take care in preparing declarations to be signed out-of-state. For a declaration to be valid it must subject the declarant to California's perjury laws. If the declaration reveals the place of execution in California, this requirement is satisfied. But if the declaration is signed outside the state, declarants must subject themselves to potential prosecution under California Law. This is done by a recital that the declaration is executed "under the laws of the state of California." (*Code Civ. Proc.* § 2015.5.) A mere recital of the place of execution outside the state does not subject a declarant to California's perjury laws and is therefore invalid. In *Kulshrestha v. First Union Commercial Corporation* (Cal.Supr.Ct., July 19, 2004) [2004 Cal. LEXIS 6292, 2004 DJDAR 8718], our Supreme Court upheld the granting of a summary judgment motion to defendant that was granted after the trial court refused to consider plaintiff's opposing declaration that showed it was executed outside the state and omitted the recital that the declaration was executed "under the laws of the state of California."

Materials prepared for mediation are absolutely privileged. In *Rojas v. Superior Court* (Cal.Supr.Ct., July 12, 2004) (S111585), [2004 Cal. LEXIS 6281, 2004 DJDAR 8387] the California Supreme Court overruled the Court of Appeal which had held that certain documentary evidence introduced in a mediation were not protected by the mediation privilege. The Supreme Court also disagreed with the portion of the Court of Appeal opinion which held that derivative materials prepared for mediation were discoverable on a showing of good cause. Our Supreme Court held that *Evidence Code* § 1119 creates an absolute privilege for such materials introduced in mediation. "Raw test data" were held not to be privileged because they are not "writings," but analyses and reports describing or analyzing these data are "writings" and thus, privileged. *See also, Foxgate v. Bramalea* (2001) 26 Cal.4th 1 [25 P.3d 1117, 108 Cal. Rptr. 2d 642] and *Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc.* (6th Cir. 2003) 332 F.3d 976, for the federal rule.

Noto Bene: The case leaves difficult issues for our trial courts to resolve. What if the "writing" is produced for a dual purpose: mediation and, if necessary, trial? Under *Evid. Code* § 1119 materials "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" are privileged. Does this mean that an otherwise discoverable document becomes subject to the privilege once it is used in the mediation process? Probably not. But, it does appear to mean that a party who learns of the existence of such evidence during the mediation cannot use the information so obtained to establish the existence of the evidence in subsequent discovery. Nor can a party who obtains evidentiary material from another party during the mediation use this material subsequently in discovery or trial. We anticipate considerable litigation requiring courts to make factual findings whether specific documents and other materials were, in fact, prepared for mediation.